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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 970

In the Matter of

ANONYMOUS No. 1, *An Attorney*,

Petitioner,

—against—

CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

HENRY WEINER
Attorney for Respondent
100 Centre Street
New York 13, N. Y.

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CO-ORDINATING COMMITTEE ON DISCIPLINE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RESPONDENT'S BRIEF IN OPPOSITION

Preliminary Statement

This is a petition for a writ of certiorari to review an order of the Court of Appeals of the State of New York, made and entered on January 9, 1964, which denied, on the ground of non-finality, petitioner's motion to review an order of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, dated October 3, 1963, which order denied petitioner's motion to reach, for the purpose of perusal prior to the commencement of the trial in a disciplinary proceeding, the minutes, and exhibits with respect thereto, of prior testimony given by witnesses in respondent's preliminary investigation of petitioner's professional conduct (R. 39).

The order of the Court of Appeals denying petitioner's motion on the ground that the order of the Appellate Division sought to be appealed from does not finally determine the proceeding within the meaning of the Constitution of the State of New York is reported at 13 N. Y. 2d 1119.

Statement of the Case

The supervision of the professional conduct of attorneys in the State of New York is imposed by statute upon the Appellate Division of the Supreme Court (subdivision 2 of 90 of the Judiciary Law). The inherent power of the State to regulate the supervision and control of attorneys is well established. *Gair* v. *Peck*, 6 N. Y. 2d 97 (1959); cert. denied, 361 U. S. 374 (1960).

Because of widespread abuses prevalent in the prosecution of personal injury claims, the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, made an order on February 3, 1959 authorizing and directing the Co-ordinating Committee on Discipline to conduct, under the personal supervision of the Presiding Justice of the Court, a continuing investigation into the conduct of attorneys in the prosecution and defense of personal injury claims and of those employed by or associated with them. This Committee is composed of the respective Chairmen of the grievance or discipline committees of the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association.

This case does not involve the usual bar association investigation of a complaint of an aggrieved client alleging neglect, conversion or some similar complaint which lends itself to adversary hearings in the investigative stage. It has been found by experience since 1929 in the State of New York

that conventional bar association grievance committees are not equipped to conduct general "ambulance-chasing" investigations, and the State Courts have used other approaches to cope with this continuing problem. This Committee does not generally operate on the basis of any specific complaint, and its investigative procedures are surrounded by safeguards to protect the rights of attorneys being investigated (see pp. 7, 8, *infra*).

Such an investigation as conducted by the Committee under the supervision of the Court is a non-adversary proceeding analogous to a Grand Jury proceeding, as was stated by the Court of Appeals of the State of New York more than thirty years ago in the landmark opinion of Chief Judge Cardozo in *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465 (1928), and that analogy was reiterated by this Court in *Anonymous 6 and 7* v. *Baker*, 360 U. S. 287 (1959).

In the course of such general inquiry, the Committee began a preliminary investigation of the professional practice of the petitioner on written notice to him dated June 9, 1961. The Committee heard the sworn testimony of a number of witnesses, including petitioner, who testified on June 20, 1961, October 9, 1962, December 18, 1962 and February 7, 1963. 291 pages of his sworn testimony were taken (R. 40).

Upon the conclusion of its preliminary investigation of petitioner's practice, the Committee, on March 12, 1963, filed a petition with the Appellate Division requesting leave to institute disciplinary proceedings, which application was granted by order of the Appellate Division dated March 14, 1963. Thereafter, on March 28, 1963, a petition was verified by the members of the Committee, with detailed charges of professional misconduct annexed, which papers

were personally served upon respondent, with notice of motion returnable before the Appellate Division on April 16, 1963. On May 16, 1963 the Appellate Division appointed a Referee to conduct hearings, to hear the evidence adduced and to report to the Appellate Division with his opinion whether such evidence sustains the charges in the petition. *The hearings before the Referee have not yet commenced, since this application by petitioner had the effect of delaying the commencement of the hearings.*

POINT I

The order sought to be reviewed is not a final order within the meaning of the Constitution of the State of New York, and the petition for a writ of certiorari should be denied on the ground of non-finality.

From the recital of the facts made above, it is clear that the order sought to be reviewed is an intermediary order, made in a disciplinary proceeding, which proceeding is presently pending, and the order sought to be reviewed does not finally determine that proceeding.

(A) Petitioner has not exhausted his remedies below. He has made no demand as yet for a bill of particulars.

Despite the fact that this disciplinary proceeding was initiated more than a year ago, petitioner has not yet made a demand for a bill of particulars (Pet. brief, p. 7). Petitioner argues by implication that he has not made the demand because such bill of particulars, when given, would not be satisfactory to him. This is patently an invalid argument. How can petitioner divine in advance what answers respondent would give to a demand for a bill of particulars not yet made? The complete answer is that,

should such an eventuality take place, petitioner would have adequate remedies to which to resort in the court below.

(B) The general policy of this Court is not to grant piecemeal review of litigation which has not been finally determined below.

The jurisdiction of this Court with respect to writs of certiorari to the highest court of a State is defined in Title 28, U. S. C., § 1257 and in Rule 19, §§ 1, 1(a) and 1(b) of the Rules of the Supreme Court of the United States, effective July 1, 1954; and none of the requirements laid down therein are met by the facts in this case.

As this Court held in *Parr* v. *United States*, 351 U. S. 513, 518, 519 (1955):

> ". . . In general, a 'judgment' or 'decision' is final for the purpose of appeal only 'when it terminates the litigation between the parties on the merits of the case, and leaves nothing to be done but to enforce by execution what has been determined.' *St. Louis, I. M. & S. R. Co.* v. *Southern Express Co.*, 108 U. S. 24, 28. This rule applies in criminal as well as civil cases. *Berman* v. *United States*, 302 U. S. 211, 212-213.
>
> . . . .
>
> "To hold this order 'final' at this stage of the prosecution would defeat the long-standing policy against piecemeal appeals."

This Court held in *Catlin* v. *United States*, 324 U. S. 229, 233-234 (1944):

> ". . . The foundation of this policy is not in merely technical conceptions of 'finality.' It is one against piecemeal litigation. 'The case is not to be sent up in fragments. . . .' *Luxton* v. *North River Bridge*

> *Co.*, 147 U. S. 337, 341. Reasons other than conservation of judicial energy sustain the limitation. One is elimination of delays caused by interlocutory appeals."

See also, *Baltimore Contractors* v. *Bodinger*, 348 U. S. 176, 178 (1954).

Petitioner in his brief (p. 11) relies upon *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1448, and *Republic Gas Co.* v. *Oklahoma*, 334 U. S. 62, 68 S. Ct. 972, 92 L. Ed. 1212 (1947). These cases are not controlling here. In *N. A. A. C. P.* v. *Alabama* there was involved an application to review a judgment of civil contempt, and this Court said in its opinion at pp. 466, 467:

> ". . . The proper method for raising questions in the state appellate courts pertinent to the underlying suit for an injunction appears to be by appeal, after a hearing on the merits and final judgment by the lower state court. Only from the disposition of such an appeal can review be sought here."

Republic Gas Co. v. *Oklahoma* is authority for the opposite of petitioner's contentions, since this Court said in that case, at page 67 of its opinion:

> "Ever since 1789, Congress has granted this Court the power of review in State litigation only after 'the highest court of a State in which a decision in a suit could be had' has rendered a 'final judgment or decree.' §237 of the Judicial Code, 28 U. S. C. §344, rephrasing §25 of the Act of September 24, 1789, 1 Stat. 73, 85. Designed to avoid the evils of piecemeal review, this reflects a marked characteristic of the federal judicial system, unlike that of some of the States. This prerequisite for the exercise of the appellate powers of this Court is especially pertinent when a constitu-

> tional barrier is asserted against a State court's decision on matters peculiarly of local concern. Close observance of this limitation upon the Court is not regard for a strangling technicality. History bears ample testimony that it is an important factor in securing harmonious State-federal relations."

and this Court stated further in *Republic Gas Co.*, at pp. 70-71:

> ". . . Appellant, of course, has the burden of affirmatively establishing this Court's jurisdiction. *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 651. The policy against premature constitutional adjudications demands that any doubts in maintaining this burden be resolved against jurisdiction. See citation of cases in the concurring opinion of Mr. Justice Brandeis in *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 341, 345, 348."

POINT II

Upon the merits, the petition for writ of certiorari should be denied, since the proceedings in the State Court adequately safeguard petitioner's rights.

(A) Safeguards in effect in the preliminary investigation and disciplinary proceeding:

(1) Petitioner was given written notice by respondent of the institution of the preliminary investigation of his practice in the prosecution of personal injury claims prior to the interrogation of any witnesses by the Committee.

(2) The investigation was directed only to *closed* accident cases.

(3) Petitioner was granted the privilege of being represented by counsel of his own choice when he was interrogated during the preliminary investigation, and his counsel was present and participated in the preliminary hearings (R. 41-43), even though this Court has held in *Anonymous 6 and 7 v. Baker*, cited *supra*, that in a preliminary investigation such as this, which is analogous to a Grand Jury investigation, counsel for an attorney may not be present in the hearing room during his interrogation.

(4) Witnesses other than petitioner who were interrogated during the preliminary investigation of petitioner's professional conduct were granted the right of counsel.

(5) Petitioner was permitted to obtain a copy of the transcript of his testimony given in the preliminary investigation.

(6) Petitioner will have a full day in court during the hearings to be held before the Referee; he will then be confronted with the witnesses who will testify against him; the rules of evidence will apply; he will be given the fullest opportunity to cross-examine such witnesses, and he will then have the use of the prior testimony, and exhibits in connection therewith, of the witnesses who testify for such purposes as he sees fit (R. 42, 43).

Willner v. *Committee on Character and Fitness*, 373 U. S. 96, 83 S. Ct. 1175, upon which petitioner relies (pp. 13-14 of pet. brief), has no applicability here. *Willner* involved questions of procedure before the Character Committee where there was no confrontation of witnesses against the applicant for admission to the Bar and no opportunity on the part of the applicant to cross-examine such witnesses, and no subsequent trial, as there is here in which such cross-examination may take place.

(B) As to disclosure of prior testimony of witnesses, respondent follows the rule laid down by the Court of Appeals in *People* v. *Rosario*.

Upon the trial of this matter, which is yet to take place before the Referee appointed by the Court below, whenever a witness for the Committee in the disciplinary proceeding completes his testimony upon direct examination, a copy of the transcript of his testimony in the preliminary inquiry, and any exhibits in connection therewith, will then be delivered to petitioner, and he may use such material for any purpose he sees fit. This is the rule laid down by the New York Court of Appeals in *People* v. *Rosario*, 9 N. Y. 2d 286, and the Committee follows that rule in disciplinary proceedings as a matter of fairness with the approval of the Appellate Division, First Department, which has passed upon this type of application a number of times (R. 39, 40).

The reason for not granting attorneys in disciplinary proceedings earlier access to the minutes of prior testimony given by witnesses in the preliminary investigation is that it opens the door to subornation of perjury, with which investigations of the prosecution of personal injury claims and disciplinary proceedings arising therefrom have been plagued for many years (R. 39, 40). See *Matter of Sparber*, 16 A. D. 2d 380 (1962); *Matter of Glassman*, 19 A. D. 2d 146 (1963); *Matter of Goldner*, 15 A. D. 2d 558 (1961); *Matter of Conjad*, 19 A. D. 2d 644 (1963), aff'd 14 N. Y. 2d 500 (1964); *In re Osofsky*, 259 App. Div. 718 (1940).

Investigations of the abuses prevalent in the prosecution of personal injury claims disclose widespread resort to the use of fraud, such as the submission to insurance carriers of fraudulent medical bills and reports, fraudulent statements of loss of earnings and fraudulent bills of

particulars. When there is *prima facie* evidence that the attorney investigated has been resorting to fraudulent practices, and the Appellate Division has authorized the bringing of charges against him, one would have to be naive indeed to believe that such an attorney, fighting to preserve his professional license at all costs, would not be tempted to resort to subornation of perjury with respect to the witnesses against him. It is the salutary policy of the state court not to facilitate subornation of perjury by disclosing the prior statements of witnesses until after such witnesses have given their testimony on direct examination at the trial.

(C) Section 3101 of the State Civil Practice Act and Rules does not apply to a disciplinary proceeding.

C. P. L. R. section 3101, relied upon by petitioner with respect to discovery and inspection, applies to ordinary civil actions and proceedings in the same way that the provisions of the prior Civil Practice Act did. Section 3101 of the C. P. L. R. is not controlling or dispositive with respect to a disciplinary proceeding, which does not fall within the category of an ordinary civil action or proceeding. A special situation exists with respect to discovery and inspection in disciplinary proceedings; and this situation has been passed upon by the Appellate Division, First Department, in four separate disciplinary proceedings over the past four years, and in each case that court unanimously denied motions such as that brought by petitioner (R. 39). Therefore, it may be said that the policy in this area has been established not by the Committee but by the State Court.

Petitioner devotes a great deal of discussion to the question "What type of proceeding is a disciplinary proceeding?" Obviously it is not a criminal proceeding (*Matter of*

Randel, 158 N. Y. 216); *Matter of Mathot*, 222 N. Y. 8, upon which petitioner relies heavily, is a 1917 decision which apparently has been cited only twice, both times in the same year of 1917 (*Matter of Braudmacher*, 222 N. Y. 522, and *Matter of Carpel*, 222 N. Y. 523). *Mathot* has not been cited since by the New York Court of Appeals in the past forty-six years. Of more significance here is *Cohen* v. *Hurley*, 7 N. Y. 2d 488, *aff'd*, 366 U. S. 117; petition for re-hearing denied, June 17, 1963, which indicates that a disciplinary proceeding, and the preliminary investigation which precedes it, are not ordinary civil proceedings, since that case holds that an attorney, as an officer of the court, must come forward and account for his professional conduct when called upon to do so by a duly authorized inquiry; and this is certainly not true with respect to a respondent or defendant in an ordinary civil proceeding.

A disciplinary proceeding, in our opinion, may be defined as a special type of civil proceeding, subject to such reasonable procedural orders as the Appellate Division of the Supreme Court, in the discretion granted to it under §90 of the Judiciary Law, shall direct. Some authorities state that a disciplinary proceeding is neither criminal nor civil (Drinker, *Legal Ethics*, page 36), and that it is *sui generis*, 58 Michigan Law Review 1218 *et seq.* (1960).

(D) The cases cited by petitioner on the subject of disclosure have no applicability here.

Petitioner relies upon the case of *Brady* v. *State of Maryland*, 373 U. S. 83 (1963). *Brady* involved suppression by the prosecution of a confession of guilt made by one defendant, which was material to the guilt or punishment of a second defendant who was convicted of murder in the first degree. The Court held that the prosecutor's failure to disclose this exculpatory evidence deprived the defen-

dant of due process. This decision has no relevancy to the facts in the instant case. A significant comment by this Court in *Brady* is as follows:

> "We usually walk on treacherous ground when we explore state laws for state courts, state agencies and state legislatures are its final expositors under our Federal system."

In *U. S. ex rel. Meers* v. *Wilkins*, 326 F. 2d 135 (C. C. A. 2), cited by petitioner, the prosecutor failed to disclose to the court and to the defense that he knew that two witnesses who were present at the scene of the robbery positively stated that they had not seen the defendant there. The Circuit Court of Appeals held, after the defendant had been convicted in the State court, that this suppression of evidence was a violation of due process. This case has no applicability to the facts here.

U. S. v. *Andolschek*, 142 F. 2d 503 (C. C. A. 2), cited by petitioner, concerns itself with the problem arising from the prosecution of a crime consisting of the very matters recorded in the suppressed document (*id.* at p. 506). That decision has no relevancy to the facts in this case.

Smith v. *Pennsylvania*, —— U. S. ——, 84 S. Ct. 763, cited by petitioner, turned upon a misapprehension on the part of State authorities as to what the Federal Bureau of Investigation was willing to disclose, and this court therefore remanded the case to make available to the defense certain material, disclosure of which the F. B. I. was not opposing.

On the general subject of disclosure in the case at bar, it is to be noted that petitioner has accessibility to all of the witnesses; he had prior relationships with all of the witnesses, and he knows who they are, since he was inter-

rogated at length about such prior relationships by the Committee (R. 40, 41).

When petitioner states that he was not confronted with the evidence against him (Pet. brief, p. 10), this is not a correct statement of the facts, as the record shows that he was confronted with the evidence against him and asked to explain his professional conduct (R. 40, 41).

(E) Reply to miscellaneous contentions by petitioner.

In the record submitted in support of this application certain recitals of fact by petitioner are not accurate.

(1) It is stated (R. 5):

> "... when the movant learned the nature of the accusations and sought to introduce evidence before the Coordinating Committee in his own behalf to show that he did not do what Dansker and Sapot said he did, the Coordinating Committee refused to hear such evidence."

This is not so. At petitioner's hearing in the preliminary investigation on December 18, 1962, Chairman Burns of the Coordinating Committee informed petitioner that if petitioner had any documentary evidence that he wished to bring in, the Committee would be glad to look at it at the next hearing (R. 41). *At the following hearing, on February 7, 1963, petitioner did not bring in any documentary evidence, thus indicating that he was not acting in good faith.* Petitioner is apparently more interested in his fruitless search to find some flaw in the Committee's procedures than he is in accounting for his professional conduct, as required by the controlling decision in the *Cohen* case, cited *supra*.

(2) It is stated in the moving papers that (R. 5):

> "While the movant was awaiting the decision of the Coordinating Committee on his demand to present evidence on his own behalf, the Committee submitted its petition to the Appellate Division . . ."

This is not so, as appears from the facts set forth in the record herein, and from the further fact that the Committee uniformly does not submit its petition to the Appellate Division until its preliminary investigation is concluded, as was the case in this matter.

(3) It is stated in the moving papers (R. 6):

> "As is seen from the opposing papers submitted, the Coordinating Committee did not question the materiality of the examinations sought. Neither did the Coordinating Committee question that adequate special circumstances existed for such discovery and examination."

This is not so. Again and again petitioner attempts to create the impression that the Co-ordinating Committee did not oppose his application below on the merits. This is quite contrary to the fact, as appears from the exhibits (R. 32-37), and from a reading of the affidavit in opposition of Committee's counsel (R. 38-43).

(4) It is stated (R. 8):

> "In the case at bar, the Coordinating Committee never disputed that there were adequate special circumstances to examine the financial records of Dansker and Sapot."

and, again (R. 10-11):

> ". . . The case for granting such an examination was clear and compelling and not even the Coordinating Committee opposed the application on the merits."

This is not so, as appears clearly from the aforementioned affidavit in opposition of Committee's counsel, particularly the following portion thereof (R. 43):

> "As part of the relief requested, respondent seeks a discovery and inspection of all of the financial records of Messrs. Sapot and Dansker. These financial records must be read together with the testimony given by Messrs. Sapot and Dansker in the preliminary investigation of the Committee. The financial records and the testimony are inextricably interwoven. That branch of the motion should be denied for the same reasons urged in connection with denial of the motion to reach the minutes prior to the time of the trial."

(5) As stated above at page 3, the Committee generally does not operate on the basis of a specific complaint or accusation of any person or persons against an attorney, and in this case it did not conduct its investigation of petitioner's professional conduct upon what petitioner describes as "accusations" of Dansker and Sapot. What the Committee did, as it was bound to do under the general directive contained in the February 3, 1959 order of the Appellate Division, was to conduct a general investigation of petitioner's conduct of his practice in the prosecution of personal injury claims. Many witnesses were interrogated under oath in the presence of an official court stenographer (R. 42), and the charges of misconduct that eventuated against petitioner are based upon the sworn testimony of many witnesses and upon documentary evidence gathered

by the Committee, and not just upon the testimony of Dansker and Sapot. Furthermore, the charges in the petition are not restricted to petitioner's relationships with Dansker and Sapot.

Petitioner states (p. 8 of his brief):

> "Dansker and Sapot (they were partners in a law firm) were allowed to plead to one count of the indictment to cover all counts and each received a suspended sentence on their promise to the sentencing court that they would furnish evidence to the Committee against 'someone' not named in the indictment. . . ."

There is no evidence whatsoever in this record to support the foregoing statement by petitioner.

Petitioner cites at page 12 of his brief one isolated case in the State court to support his application, *Matter of Friedman*, 17 A. D. 2d 644 (Second Judicial Dep't, 1962), leave to appeal denied 12 N. Y. 2nd 643. This case involved Malcolm Friedman, brother and former law partner of Mr. Justice Louis L. Friedman, who was subsequently removed from office by the New York State Court on the Judiciary, 12 N. Y. 2d, insert (a) following page 1111, cert. denied 375 U. S. 10. Apparently for reasons it deemed good and sufficient in that case alone, the Appellate Division, Second Department, made an exception to its general rule, and sustained an order granting disclosure of the preliminary testimony prior to trial. This case is no precedent, since the State court which made the decision has not followed it in subsequent cases.

(F) There is no constitutional issue in this case.

The fact that petitioner baldly asserts that he is being deprived of due process of law and that a constitutional issue exists in this case does not thereby create a constitutional issue. Petitioner has failed to state facts sufficient to make out a case that he is being deprived of any constitutional right. Far from receiving less than is his due by way of due process of law, the fact is that petitioner has received and is receiving substantially more by way of due process than has been held to be his due, as appears from the facts adverted to hereinabove and from the court decisions cited.

CONCLUSION

The petition for writ of certiorari should be denied.

April, 1964

Respectfully submitted,

HENRY WELNER
Attorney for Co-ordinating Committee on Discipline, Respondent.